IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

John Randy Deer, #155226,	)	
	)	
Plaintiff,	)	C/A No. 3:95-3692-18BC
	)	
vs.	)	
	)	
	)	**ORDER**
Captain L. Cartledge,	)	
Lieutenant F. Mursier,	)	
Officer R. Walker, and	)	
Officer C. Berry,	)	
	)	
Defendants.	)	
_____	)	

This matter is before the court upon the magistrate judge's recommendation that Defendants' Motion for Summary Judgment be granted in part and denied in part. This record includes a Report and Recommendation of the United States Magistrate Judge made in accordance with 28 U.S.C. § 636(b)(1)(B).

I. TIME FOR FILING OBJECTIONS

A party may object, in writing, to a magistrate judge's report within ten days after being served with a copy of that report. 28 U.S.C. § 636(b)(1). Three days are added to the ten day period if the recommendation is mailed rather than personally served. The magistrate judge's Report and Recommendation was filed on February 14, 1997. Defendants Berry and Walker filed timely written objections with the court on February 19, 1997. Defendants Cartledge and Mursier did not file objections. Plaintiff also filed timely

objections on March 5, 1997.

II. REVIEW OF MAGISTRATE JUDGE'S REPORT

This court is charged with conducting a de novo review of any portion of the magistrate judge's report to which a specific objection is registered and may accept, reject, or modify, in whole or in part, the recommendations contained in that report. 28 U.S.C. § 636(b)(1). Defendant Cartledge and Mursier do not object to the magistrate judge's Report and Recommendation. Defendants Berry and Walker do not object to the part of the magistrate judge's report which recommends granting Defendants' Motion for Summary Judgment as to Plaintiff's due process, equal protection, and retaliation claims and for Defendants in their official capacities.

However, Defendants Berry and Walker object to the magistrate judge's recommendation to deny their Motion for Summary Judgment on Plaintiff's excessive force claim against them in their individual capacities. They also object to the denial of qualified immunity on the excessive force claim. Berry and Walker do not object to the magistrate judge's statement of the law regarding excessive force claims but rather disagree with his application of the law to Plaintiff's case.

Plaintiff objects to the magistrate judge's granting Defendants summary judgment on his due process, retaliation, and equal protection claims. He also objects to the

magistrate judge's determination that Defendants Cartledge and Mursier are not liable for any Eighth Amendment violation under a theory of respondeat superior. Finally, Plaintiff objects to the magistrate judge's conclusion that Defendants are immune from suit in their official capacities.

A. Defendants' Objections

Determination of whether cruel and unusual punishment has been inflicted on a prisoner in violation of the Eighth Amendment requires analysis of both objective and subjective components. See Wilson v. Seiter, 501 U.S. 294, 302 (1991). First, under the objective component, *de minimis* uses of physical force, provided that the use of force is not of a sort "repugnant to the conscience of mankind," are beyond "constitutional recognition." Norman v. Taylor, 25 F.3d 1259, 1263 (4th Cir. 1994), cert. denied, ___ U.S. ___, 115 S.Ct. 909 (1995)(quoting Hudson v. McMillian, 503 U.S. 1). Because *de minimis* injury may serve as evidence that *de minimis* force was used, an excessive force claim generally should not lie where a prisoner's injury is *de minimis*. See id. at 1262-63. The magistrate judge noted that with only *de minimis* physical injury, a prisoner may recover if the challenged conduct resulted "in an impermissible infliction of pain" or was otherwise "of a sort repugnant to the conscience of mankind." Id. at 1263 n. 4. The Fourth

Circuit has explained:

> We recognize that there may be highly unusual circumstances in which a particular application of force will cause relatively little, or perhaps no, enduring injury, but nonetheless will result in an impermissible infliction of pain. In these circumstances, we believe that either the force will be 'of a sort repugnant to the conscience of mankind,' and thus expressly outside the de minimis force exception, or the pain itself will be such that it can properly be said to constitute more than de minimis injury.

Id. at 1263, n. 4.

The magistrate judge correctly determined Plaintiff's injury was no more than *de minimis*. Defendants agree and argue that because Plaintiff's injury was *de minimis* he fails the objective portion of the test. Nonetheless, the magistrate judge concluded a genuine issue of material fact existed as to whether Berry and Walker, as Plaintiff argued, used impermissible force.

Thus, the inquiry remains focused on the amount of force Berry and Walker used. Viewing the facts in the light most favorable to Plaintiff, it appears Berry pulled Plaintiff's arm "violently" through the cell window. (Complaint at ¶¶ 16-17). Thereafter, Berry and Walker shoved Plaintiff, slammed him against the wall, and struck him. (Complaint at §§ 20-24). Finally, while Plaintiff was handcuffed, Walker continued to knee Plaintiff in the back. (Complaint at § 25). Assuming Plaintiff's allegations are true, Berry and Walker's use of force was *de minimis*. See e.g., Norman v. Taylor, 25 F.3d 1259, 1262-64 (4th Cir.

1994), cert. denied, ___ U.S. ___ , 115 U.S. 909 (1995)(keys swung at inmate's face which struck his thumb was *de minimis* force); Gavin v. Ammons, 21 F.3d 430 (7th Cir. 1994)(1994 WL 117983)(guard's pulling of inmate's hair was *de minimis* force); Calabria v. Dubois, 23 F.3d 394 (1st Cir. 1994)(1994 WL 209938)(radio belt thrown at face of inmate causing blood to appear was *de minimis* force); White v. Holmes, 21 F.3d 277, 280-81 (8th Cir. 1994)(keys swung at inmate which slashed his ear was *de minimis* force); Jackson v. Pitcher, 966 F.2d 1452, 1992 WL 133041 (6th Cir.), cert. denied, 506 U.S. 1024 (1992)(guard's stomp on the hand of inmate was *de minimis* force); Black Spotted Horse v. Else, 767 F.2d 516, 517 (8th Cir. 1985)(corrections officer's pushing a cubicle wall so as to strike plaintiff's legs, brusque order of the inmate out of his cell and poking inmate in the back was *de minimis* force); see also Roberts v. Samardvich, 909 F. Supp. 594 (N.D. Ind. 1995)(grabbing inmate, pushing him up the stairs toward his cell, and placing him in cell cuffed, shackled, and secured to the door was *de minimis* force under the circumstances); McMiller v. Wolf, 1995 WL 529620 (W.D.N.Y. 1995)(snatching inmate's mirror, breaking it against cell bars and thereby lacerating inmate's finger was *de minimis* force); Crow v. Leach, 1995 WL 456357 (N.D. Cal. 1995)(corrections officer's pushing inmate into chair causing his shoulder to break window behind him was *de*

minimis force); Lyell v. Schachle, 1995 WL 870803 (M.D. Tenn. 1995)(corrections officer's pushing inmate against cell wall causing inmate to strike head was *de minimis* force); Jackson v. Hurley, 1993 WL 515688 (N.D. Cal. 1993)(blow to back of neck with forearm and kick to the ankle of inmate were *de minimis* force); DeArmas v. Jaycox, 1993 WL 37501 (S.D.N.Y.), aff'd, 14 F.3d 591 (2d Cir. 1993)(corrections officer's punching inmate in arm and kicking inmate in leg was *de minimis* force); Olson v. Coleman, 804 F. Supp. 148, 150 (D. Kan. 1992)(single blow to head of handcuffed inmate was *de minimis* force); Candelaria v. Coughlin, 787 F. Supp. 368, 374-75 (S.D.N.Y. 1992)(fist pushed against neck of inmate causing him to lose his breath was *de minimis* force); Neal v. Miller, 778 F. Supp. 378, 384 (W.D.Mich. 1991) (backhand blow with fist to the groin of inmate was *de minimis* force); Ramos v. Hicks, 1988 WL 80176 (S.D.N.Y. 1988)("bent wrist comealong hold" or single punch not unreasonable or excessive where inmate ignored repeated order, became agitated, and attempted to damage state property); Anderson v. Sullivan, 702 F. Supp. 424, 426 (S.D.N.Y. 1988)(corrections officer's pulling inmate's arms behind back, lifting them up and forcing inmate's face into cell bars was *de minimis* force).

Plaintiff's injury was *de minimis*. Berry and Walker's application of force was *de minimis*. There is nothing more

in the record to indicate this case should otherwise be considered highly unusual. Accordingly, Plaintiff has not met the objective component of his excessive force claim.

Even if Plaintiff could meet the objective component for an excessive force claim, he cannot meet the subjective component. When an inmate claims that prison officials used excessive force on him "he is forced to meet a higher standard (than deliberate indifference) to establish the subjective component." Williams v. Benjamin, 77 F.3d 756, 761 (4th Cir. 1996). The subjective portion of an excessive force claim requires a prisoner to demonstrate that officials inflicted force sadistically and maliciously for the sole purpose of causing harm. See Whitley v. Albers, 475 U.S. 312, 320-21 (1986); Williams, 77 F.3d at 761. The magistrate judge did not address the subjective component of Plaintiff's excessive force claim.

The following factors should be balanced in determining whether prison officials acted maliciously and sadistically: (1) the need for application of force; (2) the relationship between that need and the amount of force used; (3) the threat reasonably perceived by the responsible officials; and (4) any efforts made to temper the severity of a forceful response. Williams, 77 F.3d at 762 (citing Whitley, 475 U.S. 312 and Hudson, 503 U.S. at 7). The absence of serious injury is a relevant, but not

dispositive, additional factor to be considered in the subjective analysis. Id.

With respect to the first factor, Plaintiff alleges no force was needed in his situation. Berry and Walker contend force was necessary to retrieve the handcuffs from Plaintiff which were not voluntarily surrendered. Plaintiff responds that he was never ordered to, nor did he refuse to give up the handcuffs.

Nonetheless, it is undisputed that Plaintiff had the handcuffs in his possession and control when Berry and Walker entered his cell. Berry and Walker assert that force was needed to retrieve the handcuffs to prevent their being used as a weapon to strike one of them. They contend Plaintiff struck Berry with the handcuffs. Plaintiff denies attacking an officer, but admits defending himself from attack by Berry and Walker.

Berry and Walker contend, assuming force was necessary, that the amount of force they used was reasonable. To support their contention, they point to the nurse's report that indicates Plaintiff was not physically hurt. Plaintiff, as indicated earlier, alleges an impermissible use of force.

As for the third factor, Berry and Walker allege they reasonably perceived a threat of harm when Plaintiff, having a history of assault and battery and threatening conduct towards officials, retained control of the handcuffs because

they could have been used as a weapon. Plaintiff does not dispute Defendants reasonably perceived a threat of harm.

Finally, Berry and Walker allege they made efforts to temper the severity of their response. Again, they emphasize the nurse's report that there were no signs of obvious injury to Plaintiff.

Despite Plaintiff's assertion that force was not necessary, this court cannot overlook that Berry and Walker reasonably perceived a threat of harm when Plaintiff, a prisoner with a history of assault and battery and threatening conduct towards officials, had control over his handcuffs, a potential weapon. Although Plaintiff alleges he was never asked to surrender his handcuffs, he does not dispute that he had control over them. This threat alone justified the need for some use of force.

Plaintiff alleges Berry and Walker used more than minimal physical force. However, there is no indication of any physical harm to Plaintiff. Despite Plaintiff's allegations that he suffered swelling and bruising, the nurse's report does not indicate any obvious sign of injury. Furthermore, the nurse's report indicates that Plaintiff stated to the nurse that he knew he was not seriously injured, but that he wanted to have the incident documented. (Defendants' Motion for Summary Judgment, Incident Report, dated June 15, 1995). Weighing the factors listed above,

this court cannot conclude that Berry and Walker "inflicted force sadistically and maliciously for the sole purpose of causing harm" to Plaintiff. See Whitley, 475 U.S. at 320-21. Because Plaintiff has not met the objective or subjective component of his excessive force claim, Berry and Walker are entitled to summary judgment.

Because this court concludes Berry and Walker are entitled to summary judgment on Plaintiff's excessive force claim, it need not address their qualified immunity argument.

B. Plaintiff's Objections

Plaintiff contends the magistrate judge mistakenly determined his due process claim arose from Plaintiff's transfer to an institution farther away from his home, to his confinement in administrative segregation, and to his custody level. Plaintiff argues his due process claim arises from the alleged "excessive force," particularly the alleged assault by Berry and Walker, used on him. He contends this excessive force was punishment and, thus, violated his due process rights. See United States v. Cobb, 905 F.2d 784, 788 (4th Cir. 1990)(stating that liberty interest secured by Due Process Clause is to be free from the use of excessive force that amounts to punishment). (Plaintiff's Objection, claim #2). Plaintiff also argues his placement on SSR status was imposed as punishment and,

thus, violates his due process rights.

As indicated above, Plaintiff has not proven that Defendants used excessive force, nor has he shown that any force was applied as punishment. Thus, he does not have a claim for a due process violation based on use of excessive force. As for Plaintiff's SSR status argument, the magistrate judge's report accurately summarizes the case and applicable law. The magistrate judge correctly concluded Plaintiff does not have a due process claim based on his placement on SSR status.

Plaintiff alleges the magistrate judge erred in dismissing his retaliation and equal protection claims. (Plaintiff's Objection, claim #3). He also contends the magistrate judge erred in dismissing Defendants Cartledge and Mursier from liability under the respondeat superior theory. (Plaintiff's Objection, claim #5). Again, the magistrate judge's report accurately summarizes the case and applicable law. The magistrate judge correctly concluded Plaintiff does not have a retaliation or equal protection claim and that Defendants Cartledge and Mursier are not liable under a respondeat superior theory.

Third, Plaintiff asserts the magistrate judge erred in dismissing his claims against Defendants based on qualified immunity. (Plaintiff's Objection, claim #4). The magistrate judge did not find Defendants have qualified

immunity. As indicated above, because Plaintiff does not have an excessive force claim, the qualified immunity issue is moot. Plaintiff also asserts Defendants are not immune from suit because he sued them in their official capacities for declaratory relief, not monetary damages. The magistrate judge correctly acknowledged, in his Eleventh Amendment immunity analysis, that declaratory relief may be awarded against a defendant sued in his official capacity. Thus, in theory, Plaintiff's suit should be allowed against Defendants in their official capacities. However, Plaintiff has not sufficiently proven, for purposes of summary judgment, any of his claims against Defendants. Accordingly, even without a grant of immunity in their official capacities, Defendants are entitled to summary judgment.

III. CONCLUSION

To the extent it is consistent with this Order, the magistrate judge's Report and Recommendation is incorporated herein. For the reasons set forth above, it is therefore,

ORDERED that Defendants' Motion for Summary Judgment be **GRANTED.**

AND IT IS SO ORDERED.

DAVID C. NORTON
UNITED STATES DISTRICT JUDGE

March ___, 1997
Charleston, South Carolina

NOTICE OF RIGHT TO APPEAL

Plaintiff is hereby notified that he has the right to appeal this order within thirty (30) days from the date hereof, pursuant to Fed. R. App. P. 3-4.